91-1317 (2)

Supreme Court, U.S.
FILED
FEB 11 1992
OFFICE OF THE CLERK

CASE NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES

_____ TERM

ADAM CAB, INC. d/b/a
ADAM CAB COMPANY,
Appellant

v.

MARCUS E. COLLINS, SR.,
STATE REVENUE COMMISSIONER,
STATE OF GEORGIA
Appellee

ON APPLICATION TO THE SUPREME COURT
OF THE STATE OF GEORGIA FOR
DISCRETIONARY APPEAL

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

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IN THE SUPERIOR COURT,
EASTERN JUDICIAL CIRCUIT, GEORGIA

Adam Cab Inc., d/b/a Adam Cab Company,	)	
Appellant	)	
v.	)	Civil Action X89-2026-B
Marcus E. Collins, Sr., State Revenue Commissioner,	)	
Appellee	)	

ORDER ON APPELLEE'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND APPELLANT'S MOTION FOR SUMMARY JUDGMENT

Having considered the above motions of Appellee and Appellant and the entire record in this action, the Court rules as follows:

Appellee's motion for partial summary judgment is DENIED.

Appellant's motion for summary

judgment is GRANTED in part and DENIED in part as set forth below.

Appellant (Adam Cab) has appealed to this Court for judicial review of the sales tax, plus penalties and interest, assessed against it by the decision of Appellee (Revenue Commissioner) dated May 31, 1989, covering taxes generated from taxicab fares for the period of January 1, 1986 through November 30, 1986. The appeal is a de novo proceeding brought pursuant to the procedure set out in O.C.G.A. 48-2-59. Undercofler v. White, 113 Ga.App. 853, 149 S.E.2d 845 (1986)

This case deals with the effect of Department of Revenue Regulation 560122-.84(7)(b) on Adam Cab's responsibility to collect and remit sales tax on taxicab

fares generated by drivers who lease the taxicabs from Adam Cab. The section of the regulation at issue provides:

> "(b) Due to the likelihood that the State would otherwise lose tax funds due to the difficulty of policing the business operations of taxicab drivers because of the nature of the business, the lack of an office or regular place of business, and the turnover of drivers, headquarters operators and lessors of taxicabs shall collect the tax on fares for transportation of persons from their drivers as required above, and the term "headquarters operators" includes not only any person operating a headquarters for taxicabs and supervising or directing taxicab drivers, or receiving and relaying calls to taxicab driver members, but also any person or entity allowing use of the trade name of the headquarters or allowing any driver to hold himself out as being associated with the headquarters. The term "taxicab lessors" includes any person or entity leasing a vehicle to

another person or entity for use as a taxicab."

Department of Revenue Regulation 560-12-2-.84(7)(b)

It is undisputed that during the period in question Adam Cab acted as a "headquarters operator" and "taxicab lessor" by leasing cabs bearing the Adam Cab logo to drivers and relaying calls to the drivers, who charged fares for the transportation of persons. It is also undisputed that during the period at issue Adam Cab did not collect all of the sales tax on fares generated by the drivers. The Revenue Commission takes the position that Regulation 560-12-2-.84(7)(b) makes Adam Cab liable for the collection of all sales tax on fares generated by the Adam Cab drivers, whether or not the drivers

actually collected the fares from the passengers. By his motion for partial summary judgment, the Revenue Commissioner seeks an order declaring that the regulation, as so interpreted, provides adequate due process to Adam Cab and therefore is lawful under the State and Federal Constitutions. In its appeal, Adam Cab asserted that the regulation, as interpreted by the Revenue Commissioner, would be unconstitutional deprivation of property without due process. In its motion for summary judgment Adam Cab claims that the Revenue Commissioner has misinterpreted the regulation and that it cannot be held responsible for the tax deficiency, since it exercises no control over the drivers, who are employed as

independent contractors, and who have the only opportunity to collect the sales tax from the passengers.

There are apparently no Georgia cases interpreting the application of Revenue 560-12-2-.84(7)(b) under the circumstances of this case. The Court looks to the language of the regulation, which provides in part, ". . . headquarters operators and lessors of taxicabs shall collect the tax on fares for transportation of persons from their drivers as required above . . ." (emphasis supplied). If the drivers were servant employees of Adam Cab, over which control could be exercised, then Adam Cab's liability for sales taxes, which its servant drivers failed to collected, would be clear. In a

master-servant context, Adam Cab would be capable of and responsible for exercising the control over its employee drivers necessary to insure that the sales tax is collected from the passengers. However, if Adam Cab employed its drivers as independent contractors, then it could exercise no control over the time, manner and method of the driver's work and, therefore, would have no control over the collection of the tax. See, Fidelity & Casualty Co. of N.Y. v. Windham, 209 Ga. 592, 74 S.E.2d 835 (1953). In this case, the regulatory requirement that taxes be collected "from their drivers" can only mean that Adam Cab is responsible to collect from the drivers all the sales tax that the drivers actually collected from

the passengers. Department of Revenue Regulation 560-12-2-.84(7)(b). This interpretation is further supported by the fact that Section (4) of 560-12-2-.84 clearly places responsibility on the drivers, who lease taxi cabs and deal directly with the passengers, to collect the tax on fares and pay it over to the dealer (headquarters operator) for remittance to the Revenue Commissioner.

The clear language of the regulation places responsibility for collection of sales tax on those parties who deal directly with the passengers, or who otherwise have the right or opportunity to exercise control over collection of the tax. With respect to drivers with whom Adam Cab had an independent contractor

relationship, the Court finds that Regulation 560-12-2-.84(7)(b) does not make Adam Cab liable for sales tax which the drivers failed to collect from the passengers. To the extent Appellant's motion for summary judgment sought a determination to this effect, the motion is partially granted. However, the regulation's clear requirement that headquarters operators and lessors, "shall collect the tax on fares for transportation of persons from their drivers", continues to place responsibility on Adam Cab for sales tax actually collected by the drivers from passengers, which Adam Cab thereafter fails to collect from the drivers. It is a legitimate concern of the State, that if

a company chooses to create an independent contractor relationship with its taxicab drivers, it be required to create and maintain that relationship in a manner that insures the drivers will remit to the company all the taxes they collect. To the extent Appellant's motion sought relief from this liability, the same is denied. Accordingly, questions of fact exist as to the amount of sales tax collected by the drivers from passengers; the amount of such tax collected by Adam Cab from the drivers and the amount remitted to the Revenue Commissioner. To the extent Appellant sought summary judgment on these factual issues, the same is denied. The due process arguments made in support of Appellee's motion for

partial summary judgment are addressed to an interpretation of the regulation not supported by its clear language. Therefore, Appellee's motion for partial summary judgment must be denied.

Another issue raised by the pending motions is whether the taxicab drivers are independent contractors or servant employees of Adam Cab. The chief test used to determine whether a person is engaged as a servant or an independent contractor is whether the employer has or assumes the right to control the time, manner and method of the performance of the work (servant), as distinguished from the right merely to require that a certain result be obtained (independent contractor). Slater v. Canal Wood Corp.

of Augusta, 178 Ga. App. 877, 345 S.E.2d 71 (1986). A second test is whether the alleged independent contractor has a bona fide existence apart from the employer, or functions instead as the employer's alter ego. See, Buchanan v. Canada Dry Corp., 138 G. App. 588, 226 S.E.2d 613 (1976).

The record before the Court establishes as a matter of law that the taxicab drivers at issue acted as independent contractors of Adam Cab. The affidavit of Martin Koncul, CEO of Adam Cab, states that the company leases its cabs to drivers as independent contractors; that the drivers pay all expenses of operation on the vehicles; that they doe not report their locations nor are they assigned any specific

locations in which to work; that although the drivers are requested to report the amount of fares they generate, they generally will not do so and the company has no way of determining whether or not any reports made by the drivers are accurate; that no control is asserted over any of the driver's activities. The affidavits of two taxicab drivers, who lease taxicabs from Adam Cab, indicate that they rent the cabs for $52.00 per day and the drivers pay for all maintenance, gasoline, oil, license fees and insurance; that they can drive the cab to any location and are not under the control of Adam Cab. (Affidavits of Sapp and Hendricks). The drivers also relate that passengers will seldom pay the sales tax

on fares, but that as much of the sales tax they do collect, they remit to Adam Cab. Id.

The fact that the taxicabs bore the Adam Cab logo and that Adam Cab acted as a headquarters to relay telephone calls for fares to the drivers is not sufficient to show that Adam Cab controlled the driver's activities or that the drivers acted as the company's alter ego. See, Fidelity & Casualty Co. of N.Y. v. Windham, 209 Ga. 592, 74 S.E.2d 835 (1953). To the extent Appellant sought to establish that its drivers acted as independent contractors its motion for summary judgment is granted. Slater, supra.; Also, Fidelity, supra, (for similar facts found to establish taxicab driver independent

contractor relationship).

The Court notes that some municipalities apparently have enacted ordinances, which prohibit cab companies from employing drivers as independent contractors. See, Worrell v. Yellow Cab Company, 146 Ga. App. 748, 247 S.E.2d 569 (1978), affirmed in part at 155 Ga.App. 41, 273 S.E.2d 410 (1980). Obviously, such an ordinance could alter the result in this case. However, no such ordinance has been enacted by the City of Savannah, where Adam Cab is located.

So ORDERED, this 31st day of July, 1990.

/s/
PERRY BRANNEN, JR., JUDGE
SUPERIOR COURT, EJC, GA.

cc: Daniel E. Formby
Amelia Waller Baker
Fred Clark

In the Supreme Court of Georgia

Decided: JUN 07 1991

S91A0131. COLLINS, COMMR. v. ADAM CAB, INC., d/b/a ADAM CAB CO.

BENHAM, Justice.

Pursuant to Regulation 560-12-2-.84(7)(b) of the Rules and Regulations of the Georgia Department of Revenue, appellant State Commissioner issued a tax assessment of $18,765.18 against appellee Adam Cab for failure to remit sales tax on fares for transportation for January through November 1986. We granted the Commissioner's application for discretionary review of the denial of his motion for summary judgment to determine whether the trial court correctly interpreted the revenue regulation.

Regulation 560-12-2-.84 allocates responsibility for the collection of the tax on fares for transportation of persons and the remittance thereof to the State Commissioner.[1] In 1983, Regulation 560-12-2-.84 was supplemented with the

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[1]An owner and operator of a cab collects the tax on fares and remits it to the State Commissioner; one who leases or rents a cab from another who supervises his operations collects the tax and pays it to his lessor, who remits it to the State Commissioner; one who leases a cab which is partially operated by both the lessor and lessee collects the tax and remits it to the lessor for remittance to the State Commissioner; a cab driver who operates out of a headquarters for cabs, is supervised or directed by the headquarters operator or receives relayed calls from the headquarters operators collects the tax and pays it to the headquarters operator who remits it to the State Commissioner. An "independent" taxicab driver collects the tax and remits it directly to the State Commissioner.

subparagraph at issue ((7)(b)), which states:

> "Due to the likelihood that the State would otherwise lose tax funds due to the difficulty of policing the business operations of taxicab drivers because of the nature of the business, the lack of an office or regular place of business and the turnover of drivers, headquarters operators and lessors of taxicabs shall collect the tax on fares for transportation of persons from their drivers as required above, and the term "headquarters operators" includes not only any person operating a headquarters for taxicabs and supervising or directing taxicab drivers, or receiving and relaying calls to cab driver members, but also any person or entity allowing use of the trade name of the headquarters or allowing any driver to hold himself out as being associated with the headquarters. The term "taxicab lessors" includes any person or entity leasing a vehicle to another person or entity for use as a taxicab."

The trial court found that, during the 11-month period in question, Adam's Cab leased cabs bearing the Adam Cab logo to drivers and relayed calls to the drivers, thereby qualifying as a "headquarters operator" and a "taxicab lessor" under the amended revenue regulation. It then determined that the regulation required Adam Cab to remit to the State Commissioner only that tax on fares actually collected by its independent contractor drivers from their passengers.

In so ruling, the trial court failed to take into account the statement of public policy and concerns set forth in the amended regulation. There the Department of Revenue recognized the need

to collect the tax on fares for transportation of persons; the vital role in the collection of the tax played by the taxicab driver; and the impossibility or impractibility, due to the nature of the business operations of taxicab drivers, of the State to collect the tax from the individual drivers. Because of those factors, the Department of Revenue placed the burden on the headquarters operators and taxicab lessors to collect the tax from the drivers for remittance to the State Commissioner.[2] It is clear that one

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[2]The burden so placed is similar to the burden placed by OCGA §48-8-2 (6)(G) on those who sell tangible personal property to persons for resale when there is a likelihood the State will lose tax funds due to the difficulty of policing the business operations of the retailer. Cf. Independent Publishing Co. v. Hawes,

who meets the regulatory definition of lessor or headquarters operator is in a better position to arrange with the individual drivers with whom it does business for the collection and remittance of the tax on fares than is the State, and that the regulation places that burden on the lessor or headquarters operator. Disagreeing with the trial court's interpretation of Regulation 560-12-2-.84(7)(b), we reverse its judgment insofar as it limits Adam Cab's liability to the taxes actually collected by its independent contractor drivers.[3]

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119 Ga. App. 858 (168 SE2d 904) (1969).

[3]That a driver may be an independent contractor does not mean he is an independent taxicab operator, individually

2. Our ruling in Division 1 does not require the grant of summary judgment to appellant. This case must be remanded to the trial court for consideration and resolution of the constitutional issues raised by appellee but not ruled upon by the trial court.

Judgment reversed and case remanded. All the Justices concur.

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responsible for remittance of the tax on fares to the State Commissioner, since "independent taxicab operator" is defined in the regulation as "a person totally unassociated with any headquarters operation and with any lessors of taxicabs and with any other taxicab business or driver." Reg. 560-12-2-.84(7)(a).

IN THE SUPERIOR COURTS, EASTERN JUDICIAL CIRCUIT, GEORGIA

Adam Cab, Inc., d/b/a Cab Company, Appellant,	*	CA#X89-2025-4
v.	*	
Marcus E. Collins, Sr., State Revenue Commissioner, Appellee.	*	

ORDER ON APPELLEE'S REINSTATED MOTION FOR PARTIAL SUMMARY JUDGMENT

This case involves an appeal of a tax assessment by the Georgia Department of Revenue against Adam Cab, Inc. d/b/a Adam Cab Company, for the period of January 1, 1986 through November 30, 1986. The appeal to the Superior Court of Chatham County is from a decision of the State Revenue Commissioner of May 31, 1989, in which the Revenue Commissioner assessed

taxes, interest and penalties for the period of January 1, 1986 through November 30, 1986.

The issue in this case concerns the Department of Revenue's Regulation 560-12-2-.84(7)(b) affect on Adam Cab's responsibility to collect and remit sales tax on taxifares generated by the drivers who lease the taxicabs from Adam Cab Company. The section of the Regulation at issues provides:

> "(b) Due to the likelihood that the State would otherwise lose tax funds due to the difficulty of policing the business operations of taxicab drivers because of the nature of the business, the lack of an office or regular place of business, and the turnover of drivers, headquarters operators and lessors of taxicabs shall collect the tax on fares for transportation of persons from

> their drivers as required above, and the term 'headquarters operations' includes not only any person operating a headquarters for taxicabs and supervising or directing taxicab drivers, or receiving and relaying calls to cab driver members, but also any person or entity allowing use of the trade name of the headquarters or allowing any driver to hold himself out as being associated with the headquarters. The term 'taxicab lessors' includes any person or entity for use as a taxicab. Department of Revenue Regulation 560-12-2-.84(7)(b)."

This Court in its original consideration of the appellee's Motion for Partial Summary Judgment and the appellant's Motion for Summary Judgment denied the appellee's Motion for a Partial Summary Judgment and granted in part the appellant's Motion for Summary Judgment. In this Court's Order dated August 2,

1990, the Court held that 560-12-2-.84(7)(b) placed the responsibility of collecting the taxes on the drivers who leased the cabs and who dealt directly with the passengers. The drivers were then to pay the tax collected to the cab company who would then remit the taxes to the Revenue Commissioner. In accordance with this interpretation of the Regulation the Court held that Adam Cab was only responsible for the taxes which were actually collected by the drivers.

This Order was appealed to the Supreme Court and on June 7, 1991 the Supreme Court reversed and remanded the decision to the Superior Court of Chatham County. The Supreme Court based its interpretation of the Regulation on the

Department of Revenue's statement of public policy as set forth in the amended Regulation. This public policy statements articulates the importance of collecting taxes on transportation fares, the vital role taxicab drivers play in the collection of the taxes, and the anticipated difficulties involved in the State's collecting the taxes directly from the drivers. The Supreme Court reversed the ruling of the Superior Court of Chatham County concerning the limitation upon the liability of Adam Cab. The Court then remanded the case back to the Superior Court of Chatham for a decision on the constitutional issues.

The appellee has now moved this Court to reinstate its Motion for Partial

Summary Judgment. During a hearing on this reinstatement of the Motion all parties agreed that the constitutional issue had been fully briefed and that they would stand by the briefs previously submitted to this Court. The decision of the Court today focuses solely on the constitutional issues of this case, as raised by the parties in their respective briefs.

The appellant, in its Motion for Summary Judgment failed to raise any constitutional challenge to the Department of Revenue's regulation. However, the appellee in its reinstated Motion for Partial Summary Judgment argued that the Regulation as applied in this case was constitutional. The appellee argued that

the Regulation was reasonably regulated to legitimate State interest. Adam Cab, in response to appellee's Motion, argued that Frankel v. Cone, 214 Ga. 733 (1959) was controlling and that the Court must find the Regulation unconstitutional.

The standard generally accepted for determining constitutionality under the Due Process clause when reviewing tax regulations is the rational relationship test. Under this analysis the regulation is presumed valid as long as it bears a rational or reasonable relationship to a legitimate governmental purpose. Adam Cab, as the party challenging the constitutionality of the Regulation, failed to overcome this presumption. Although this Court finds that Frankel,

supra, raises interesting issues, this Court, without further guidance from the higher courts of this State, is not in a position to apply Frankel, supra, to taxes. Therefore, this Court must hold the Regulation as written constitutional. The appellee's reinstated Motion for Partial Summary Judgment is GRANTED, only as to the constitutionality of the Regulation.

SO ORDERED THIS 29TH DAY OF OCTOBER, 1991.

/s/
PERRY BRANNEN, JR. JUDGE
SUPERIOR COURTS, EJC, GA.

Copies to:

Fred S. Clark, Esq.
Daniel Formby, Esq.

Case No. S92D0276

SUPREME COURT OF GEORGIA

ATLANTA DEC 18, 1991

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

ADAM CAB, INC., d/b/a ADAM CAB COMPANY V. MARCUS E. COLLINS, COMR.

From the SUPERIOR COURT OF CHATHAM COUNTY.

Upon consideration of this Application for Discretionary Appeal, it is ordered that it is hereby denied.

All the Justices concur, except Clarke, C. J., Smith, P. J., and Bell, J., who dissent.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes, of the Supreme Court of Georgia. Witness my signature and the seal of said Court affixed the day and year last above written.

/S/ Lynn M. Stinchcomb, Deputy Clerk

SUPREME COURT OF GEORGIA

ATLANTA JANUARY 08, 1992

Case No. S92D0276

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

ADAM CAB, INC., d/b/a ADAM CAB COMPANY V. MARCUS E. COLLINS, COMR.

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

Clarke, C. J., Weltner, P. J., Bell, J., Hunt and Fletcher, JJ., who concur. Benham, J., who dissents.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia. Witness my signature and the seal of said court affixed the day and year last above written.

/S/ Joline B. Williams, Clerk

Case No. S92D0276

SUPREME COURT OF GEORGIA

ATLANTA January 15, 1992

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

ADAM CAB, INC., d/b/a ADAM CAB COMPANY V. MARCUS E. COLLINS, COMR.

It is ordered that this Court's order of January 8, 1992, be amended to show Benham, Jr., concurring rather than dissenting and Bell, J., dissenting rather than concurring.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is

a true extract from the minutes

of the Supreme Court of Georgia.

Witness my signature and the seal of said Court hereto affixed the day and year last above written.

/S/ Lynn M. Stinchcomb, Deputy Clerk

STATE OF GEORGIA

CHATHAM COUNTY

PERSONALLY APPEARED before the undersigned officer duly authorized to administer oaths, ROGER F. HENDRICKES, who on oath taken deposes and swears as follows:

I am a tax cab driver by profession, driving Adam Cab Company vehicles. I rent my taxi cab from Adam Cab Company paying $52 per day. I pay for all maintenance, gasoline, oil, license fees and insurance. When I drive away from Adam Cab Company I can go any place that I want with the taxi cab. I am not under the control of Adam Cab Company.

I do not have to drive for Adam Cab Company. I can rent from another cab company.

I have very seldom been able to get a customer to pay the sales tax on the fare. Whenever I ask I am told to take the sales tax out of the tip.

I turn in as much of the sales tax as I collect to Adam Cab Company because I do not know what else to do with it.

I understand that this affidavit is given in the appeal of Adam Cab Company of the assessment for uncollected sales tax on fares.

This 10th day of February, 1990.

LUTHER HANCOCK
Notary Public,
Chatham County, Ga.
My commission expires
April 2, 1991

/s/
Roger F. Hendrickes

Sworn to and subscribed
before me this 10th day
of February, 1990.

/s/Luther Hancock
NOTARY PUBLIC, CHATHAM
COUNTY, GEORGIA

STATE OF GEORGIA

CHATHAM COUNTY

PERSONALLY APPEARED before the undersigned officer duly authorized to administer oaths, JOHN SAPP, who on oath taken deposes and swears as follows:

I am a tax cab driver by profession, driving Adam Cab Company vehicles. I rent my taxi cab from Adam Cab Company paying $52 per day. I pay for all maintenance, gasoline, oil, license fees and insurance. When I drive away from Adam Cab Company I can go any place that I want with the taxi cab. I am not under the control of Adam Cab Company.

I do not have to drive for Adam Cab Company. I can rent from another cab company.

I have very seldom been able to get a customer to pay the sales tax on the fare. Whenever I ask I am told to take the sales tax out of the tip.

I turn in as much of the sales tax as I collect to Adam Cab Company because I do not know what else to do with it.

I understand that this affidavit is given in the appeal of Adam Cab Company of the assessment for uncollected sales tax on fares.

This 10th day of February, 1990.

/s/
JOHN SAPP

Sworn to and subscribed
before me this 10th day
of February, 1990.

/s/Luther Hancock
NOTARY PUBLIC, CHATHAM
COUNTY, GEORGIA

LUTHER HANCOCK
Notary Public,
Chatham County, Ga.
My commission
expires April 2,
1991

IN THE SUPERIOR COURT OF CHATHAM COUNTY

ADAM CAB, INC. d/b/a ADAM CAB COMPANY, Appellant	*	
VS.	*	CIVIL ACTION X89-02026-4
MARCUS E. COLLINS, SR., STATE REVENUE COMMISSIONER, Appellee	*	

BRIEF OF APPELLANT

Statement of Facts

The Georgia Department of Revenue has assessed Adam Cab Company for uncollected sales taxes that were to be collected from passengers by the drivers. Every driver is an independent contractor who leases a taxi cab from the Appellant. The cabdriver collects the fares but is not obligated to report the fares to the company as a matter of company policy.

The driver may report the fares collected and may pay over sales tax. However, if the driver does this, it is essentially voluntary since the company has no means by which to insure that the proper taxes are collected and paid or that the correct amount of the fares are reported.

The Revenue Department made no audit of Appellant's financial records nor the records of the taxi cab drivers. Nevertheless, the Revenue Department's assessment is based on a calculation bureaucratically made with no relationship to the actual experience of the drivers.

Argument of Law

The Revenue Department alleges that the cab company failed to collect and remit sales tax for fares received by the

lessees of its cabs as required under Ga. Comp. Rules and Regulations, 560-12-2.84(2)(3)(7b) 1983. However, the drivers are independent contractors who lease the vehicles, do not report or pay any portion of the fares they receive to the company. They pay all expenses of the operation of the vehicles. The regulations require independent taxi cab drivers to pay the sales tax on their fares directly to the Revenue Department. Ga. Com. Rules and Regulations, 560-12-2-.84(5).

These regulations provide:

560-12-2-.84 Taxicabs. Amended.

"(2) . . . Additionally, lessees or rentees of taxicabs shall collect the tax on fares

for transportation of persons in accordance with the uniform bracket system. Said lessees or rentees shall pay the tax on charges for the lease or rental of tangible personal property and fares collected for transportation of persons to their lessors or renters and said lessors or renters shall remit same to the State Revenue Commissioner.

(3) Taxicab operators and lessors. Any person owing and leasing taxicabs which are operated partially by the owner and partially by the lessee shall register as a dealer and

pay the tax at the time of purchase on tangible personal property used or consumed in the operations, including taxicabs, meters, accessories, tires, repair parts, gasoline, lubricants, and other supplies. Additionally, such lessors shall collect the tax on the gross lease or rental charges for taxicabs and equipment, and shall collect the tax on any tangible personal property sold to lessees. Lessees shall collect the tax on fares for transportation of persons in accordance with the uniform bracket system and pay such tax

to the lessor for remittance to the State Revenue Commissioner.

(5) Independent taxicab operators. Independent taxicab operators shall register as dealers and pay the tax at the time of purchase, lease or rental on all equipment, materials, and supplies used or consumed in the operations. Additionally, such persons shall collect the tax on fares for transportation of persons in accordance with the uniform bracket system and remit same to the State Revenue Commissioner.

(7) Definitions.

. . .

(b) Due to the likelihood that the State would otherwise lose tax funds due to the difficulty of policing the business operations of taxicab drivers because of the nature of the business, the lack of an office or regular place of business and the turnover of drivers, headquarters operators and lessors of taxicabs shall collect the tax on fares for transportation of persons from their drivers as required above, and the term "headquarters operators" includes not only any person

operating a headquarters for taxicabs and supervision or directing taxicab drivers, or receiving and relaying calls to cab driver members, but also any person or entity allowing use of the trade name of the headquarters or allowing any driver to hold himself out as being associated with the headquarters. The term "taxicab lessors" includes any person or entity leasing a vehicle to another person or entity for use as a taxicab. G.C.R. & R. r. 560-12-2-.84 (2), (3), 5, (7)(b)."

The issue involves the relationship between the owners and drivers and the legal obligations each has to the other. That is, if the drivers are employees the cab company would have control over the drivers. Thus, they could effectively require the drivers to report the fares and pay the tax. Without such control, they have no control over the drivers.

There are no Georgia cases in point. However, in a Minnesota case a distinction was made between employees and independent contractors. Corbin v. Commissioner, 307 Minn. 237, 240 N.W.2d 809 (1976). That Court held that a distinction between employees and independent contractors is critical because where an employee makes the sale

the sale is attributed to the employer. However, where the sale is made by an independent contractor, it is his own sale and he alone is responsible for collecting and remitting the sales tax. Corbin v. Commissioner, 307 Minn. 237, 240 N.W.2d 809, 812 (1976). That Court held in another case that a party does not have the duty to collect sales tax unless that party has adequate control over the payments in question and an adequate opportunity to set aside the sales tax from such payments. Fridlund Securities Co. v. Minnesota Commissioner of Revenue, _____ Minn. _____, 430 N.W.2d 154. A similar distinction should be made in the instant case and can readily be applied based on the Georgia statutes. OCGA

48-8-1 contained a statement by the legislature of its intention to tax services. In the case of a cab company with independent drivers the drivers are providing the service and not the company.

Similarly, in Wyoming the appellate court in that state ruled that if cab drivers are independent contractors they must contribute to the State Unemployment Compensation Fund. The determination was made there based on certain factual situations that would certainly be applicable in this case which are as follows:

> "(1) Control exercised by cab company over its drivers as evidenced by the presence or absence of rate schedules, the

ability of either party to terminate the agreement at any time, et cetera;

(2) Freedom of drivers under their lease agreement to perform their duties as they see fit;

(3) Whether the 'essence' of the cab company's business is conducted in the cab between a customer's origin and destination, or in the company's office;

(4) Whether the state and local cab permits are held by the driver or the company;

(5) The extent of materials furnished by the cab company,

such as gas, oil, liability insurance, license fees, capital for the driver to purchase the cab, and other miscellaneous equipment;

(6) Which party bears the risks of the relationship, i.e., is the driver dependent on the cab company to earn his livelihood;

(7) The leasing agreement itself."

Employment Security Commission of Wyoming v. Laramie Cabs., Inc., 700 P.2d 399, 405-09 (Wyo. 1985)

The regulations seem to indicate that the Georgia Revenue Department considers independent taxicab operators to be

treated separately from employee operators. These regulations define independent taxicab operators separately. They are by regulation required to register as dealers and pay the tax at the time of purchase, lease or rental on all equipment, materials and supplies used or consumed in the operations. The regulations state further, " . . such persons shall collect the tax on fares for transportation of persons in accordance with the uniform bracket system and remit same to the State Revenue Commissioner". G.C.R.&R. r. 560-12-2-.84(5).. Further, the definitions state at 7a, "The term 'independent taxicab operator' means a person who is totally unassociated with any headquarters

operation and with any lessors of taxicabs and with any other taxicab business or driver." Reading this in association with the provisions of OCGA 48-8-1 setting the legislators intent to tax services, a cab company which has no control over the activities of the lessees do not render the taxable services in question, meaning the rides, and therefore should not be responsible for collecting and remitting sales tax on services they do not render. Thus, it would be inconsistent to hold taxicab lessors liable for collecting the tax where they have rendered no taxable service.

Likewise, a Florida court held that in a lessor-lessee relationship a statute which designates the lessor as an agent

for collecting and remitting taxes to the state revenue department must be read as meaning that the lessee must pay the tax. Noriega v. Schnurmacher Holding, Inc., 528 So. 2d 28, 30 (Fla. 3d DCA 1988). Georgia law provides a similar provision in that the dealer is required to collect a tax imposed from the purchaser or consumer and the dealer is to pay the tax over to the revenue commissioner. OCGA 48-8-33. This provides, "Notstanding any exemption from taxes which a dealer enjoys under the Constitution or laws of this state, any other state, or the United States, the dealer shall collect the tax imposed by this article from the purchaser or consumer and shall pay the tax over to the commissioner as provided by law."

This confirms that a lessor who merely acts as an agent for the state in collecting sales tax is not intended to be the party who is liable for paying it. It is the driver-lessee who should be held liable for the deficiency in this case.

An Alabama case if applied in the instant situation, puts the Revenue Commissioner's decision to assess the taxicab company in a most unfavorable light. In the case of Alabama v. Advertiser Company, 337 So. 2d. 942, 947 (Ala. 1976), the court interpreted an attempt by the Alabama legislature to have the collection of sales tax from the actual newspaper sellers by the newspaper itself. It stated that the regulation, ". . . is nothing more or less than the

department's unilateral decision to refuse to collect the tax from the individuals on whom the statute places it. . . ., it is not proper for the department to make up the lost revenue by proceeding against a party whose liability arises only because of the unilateral refusal." State of Alabama v. Advertiser Company, 337 So. 2d. 942, 947 (Ala. 1976) A similar attempt is being made by the Commissioner in the instant case and should not be allowed.

Conclusion

For all of the foregoing reasons, it is respectfully submitted that the assessment against the taxicab companies

was improper and the regulation should be deemed invalid and the assessment relieved.

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IN THE SUPERIOR COURT OF CHATHAM COUNTY
STATE OF GEORGIA

ADAM CAB, INC. d/b/a ADAM CAB COMPANY, Appellant	*	
VS.	*	CIVIL ACTION X89-02026-4
MARCUS E. COLLINS, SR., STATE REVENUE COMMISSIONER, Appellee	*	

BRIEF IN SUPPORT OF APPELLEE'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN OPPOSITION TO APPELLANT'S MOTION FOR SUMMARY JUDGMENT

This case involves the appeal of a tax assessment issued by the Georgia Department of Revenue (hereinafter "the Department") against Adam Cab Company (hereinafter "Adam Cab") for failure to remit sales tax to the Georgia Department of Revenue for the period January 1, 1986 through November 30, 1986. In this

appeal, Adam Cab has challenged the constitutionality of the regulation under which the Department has issued the tax assessment as well as the amount of the assessment. The Department moves here for partial summary judgment as to the constitutionality of Department of Revenue Regulation 560-12-2.84(7)(b) and its application to Adam Cab.[1] As will be demonstrated below, the regulation challenged by Adam Cab is constitutional

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[1]The Department has moved for partial summary judgment because even if it prevails as to the validity of the regulation there may still be a dispute as to the amount of the assessment against Adam Cab. Adam Cab has moved for summary judgment because if it prevails as to its challenge to the validity of the regulation, there will be no other issue to be decided.

as is its application to Adam Cab and the Department is entitled to judgment in its favor as a matter of law.

STATEMENT OF FACTS

Adam Cab has brought this appeal challenging an assessment issued against it by the Department for delinquent sales tax for the period January 1, 1986 through November 30, 1986.

Adam Cab is in the business of leasing taxicabs and operating a headquarters for taxicabs. All of the taxicabs which Adam Cab leases or which use Adam Cab as a headquarters bear Adam Cab's logo. Affidavit of Alver B. Claxton. During the period of January 1, 1986 through November 30, 1986, Adam Cab, acting as a lessor of taxicabs and as a

headquarters, did not collect or remit to the Department any sales tax on fares for transportation generated by taxicab drivers leasing cabs from it or using it as a headquarters. Appellant's Answer to Appellee's Interrogatory No. 12. During this same period of time, Adam Cab did not maintain any records regarding fares paid for transportation generated by taxicabs which it either leased or for which it acted as a headquarters. Appellant's Answer to Appellee's Interrogatory No. 5.

In March and April of 1989, the Department audited Adam Cab. The audit indicated that Adam Cab had failed to collect and remit any sales tax to the Department for the period January 1, 1986 through November 30, 1986. Because Adam

Cab did not provide the Department with any records from which its fare tax liability could be directly determined, the Department determined Adam Cab's fare tax liability by using documented fares of another cab company in Chatham County. Affidavit of Alver B. Claxton.

Pursuant to Department of Revenue Regulation No. 560-12-2.84(7)(b) (attached hereto as Exhibit "A"), which regulation became effective on March 20, 1983, the Department assessed Adam Cab as a taxicab lessor and headquarters operator for delinquent sales tax in the amount of $18,765.18. By petition dated May 25, 1988, Adam Cab petitioned the Department for a redetermination of tax liability on the ground that the assessment against

Adam Cab constituted an unconstitutional deprivation of property without due process. After consideration of the petition, the Department issued a final determination of liability in the amount of $18,765.18, finding no basis for adjusting the tax liability of its preliminary assessment. It is from this official notice of assessment and demand for payment that Adam Cab has appealed.

ARGUMENT AND CITATION OF AUTHORITIES

I. Adam Cab Is Required By Law To Collect And Remit To The Department Sales Tax On Fares For Transportation.

Regulation 560-12-2.84 requires any person leasing taxicabs to others or operating as a headquarters for taxicab drivers to register as a dealer with the

Department for purposes of collecting and remitting sales tax. Regulation 560-12-2.84 also specifically requires lessors and headquarters operators to collect and remit sales tax on fares collected for transportation of persons to the State Revenue Commissioner.

Although this regulation has always placed the burden of collecting and remitting sales tax on fares for transportation upon the taxicab lessor and headquarters operator, the regulation was amended in 1983 to further clarify the role of the lessor and headquarters operator as agents of the State in the collection and remittance of sales tax. Paragraph 7 of the regulation, added in 1983, provides as follows:

"Due to the likelihood that the State would otherwise lose tax funds due to the difficulty of policing the business operations of taxicab drivers because of the nature of the business, the lack of an office or regular place of business and the turnover of drivers, headquarters operators and lessors of taxicabs shall collect the tax on fares for transportation of persons from their drivers as required above, and the term 'headquarters operators' includes not only any person operating a headquarters for taxicabs and supervising or directing taxicab drivers, or receiving or relaying calls to cab driver members, but also any person or entity allowing use of the trade name of the headquarters or allowing any driver to hold himself out as being associated with the headquarters. The term 'taxicab lessors' includes any person or entity leasing a vehicle to another person or entity for use as a taxicab."

Revenue Regulation 560-12-2.84(7)(b) (emphasis added). Because Adam Cab is a

"taxicab lessor" as well as a "headquarters operator," it is required to collect sales tax from its drivers.

II. Regulation 560-12-2.84, As Applied In This Case, Does Not Deprive Adam Cab Of Due Process Of Law Or Of Equal Protection Under The Law.

There is absolutely no merit to Adam Cab's constitutional challenge to Regulation 560-12-2.84(7)(b) or its application in this case. In its appeal, Adam Cab argues that the imposition upon it of the requirement of collecting sales tax from its lessees deprives it of property without due process. In its motion for summary judgment and supporting brief, however, Adam Cab does not elaborate at all on its constitutional argument and, in fact, does not set forth

a single argument or case in support of its constitutional challenge to the Regulation.

Adam Cab has set forth no support for its constitutional challenge because there is none. Indeed, a review of the relevant case law reveals that the regulation at issue clearly complies with both procedural and substantive due process requirements. With respect to procedural due process, it is well established that the notice of the assessment of the Commissioner issued to Adam Cab and the right to appeal to this Court provides for sufficient procedural due process. Richards v. Blackmon, 233 Ga. 739, 213 S.E.2d 638 (1975); Buice v. Dickson, 223 Ga. 645, 157 S.E.2d 481 (1967).

With respect to substantive due process, Georgia case law as well as federal case law indicate that the test of constitutionality is "'whether the method of regulation embodied in the statute bears a reasonable relation to a constitutionally permissible object.'" State v. Major, 243 Ga. 255, 257, 253 S.E.2d 724 (1979) (citations omitted); Anderson v. Little & Davenport Funeral Home, Inc., 242 Ga. 751, 251 S.E.2d 250 (1978).[2] In other words, the standard is

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[2]This same test is used in the context of an equal protection challenge. It appears from the Appeal that Adam Cab may also be challenging the Regulation on equal protection grounds. For the reasons set forth above, its equal protection challenge, like its due process challenge, its without merit.

one of "reasonable relationship." Applying this standard to the regulation at issue, it is clear that the regulation is valid.

The objection of Regulation 560-2-2.84(7)(b) as well as of Georgia's sales tax laws is to ensure the collection and remittance of sales tax to the State -- clearly a legitimate State interest. See International Harvester Co. v. Wisconsin Dept. of Taxation, 322 U.S. 435 (1944) (power to tax and to collect taxes is included in states' inherent power of taxation). Regulation 560-2-2.84(7)(b) seeks to achieve this legitimate objective in an industry difficult to monitor by imposing the burden of collecting and remitting sales tax on those persons who

lease taxicabs to drivers or operate a headquarters for taxicab drivers. Given that lessors of taxicabs and headquarters operators, such as Adam Cab, have daily contact with and supervision over taxicab drivers, it is certainly reasonable for them to be required to collect and remit sales tax to the State. See International Harvester Co. v. Wisconsin Dept. of Transportation, 322 U.S. at 443-44 ("some practically effective devise [is] necessary in order to enable the state to collect its tax); Wells v. Malloy, 402 F.Supp. 856 (D. Ver. 1975), aff'd, 538 F.2d 317 (2d Cir. 1976) (state tax collection procedure need only be fair and reasonable).

It is also important to note that the Georgia Supreme Court upheld a similar law in the case of Richards v. Blackmon, 233 Ga. 739, 213 S.E.2d 638 (1975). In Richards v. Blackmon, a taxpayer challenged on due process and equal protection grounds a Georgia statute making a purchaser of a business personally liable for sales tax unpaid by the former owner. The taxpayer argued that the statute was unconstitutional because it sought to impose liability and judgment on it based upon a mere relationship or association without a justifiable connection between the seller and purchaser of the business. The Georgia Supreme Court, however, found that there was no merit to the taxpayer's

constitutional challenge to the statute and in so doing observed that the taxpayer could have prevented its personal liability by withholding a sufficient part of the purchase money to cover unpaid taxes as provided for in the challenged statute. Id. at 741.

Similarly, in this case, Adam Cab is presumed to have known the requirement of the sales tax regulation. Adam Cab, like the taxpayer in Richards v. Blackmon, could have prevented its liability by collecting sales tax from its taxicab drivers and remitting it to the State as required by regulation. Contrary to Adam Cab's argument, there is absolutely no reason why Adam Cab could not have collected sales tax from its drivers. As

the lessor of the taxicab vehicles and as a headquarters operator for the drivers, Adam Cab Company was certainly in a position to require its taxicab drivers to report fares collected on a daily basis. Furthermore, in setting the rental rates for its cabs as well as fees for using the headquarters, Adam Cab presumably had some reasonable idea as to the amount of fares being collected by its drivers. In other words, Adam Cab was in a position to know approximately how much sales tax should be remitted by its drivers. If the taxicab drivers failed or refused to collect and remit sales tax to Adam Cab, Adam Cab could have simply terminated its relationship with the drivers.

Given the Regulation is reasonably related to a legitimate State objective and that Adam Cab has failed to demonstrate that the Regulation lacks a reasonable basis, the Regulation must be upheld. See Anderson v. Little & Davenport Funeral Home,Inc., 242 Ga. 751, 242 Ga. 751 (1978) (one who assails constitutionality of law on equal protection and due process grounds must carry the burden of showing that it does not rest on any reasonable basis).

III. Regulation 560-12-2.84(7)(b) Imposes Responsibility of Collecting and Remitting Sales Tax on Adam Cab Whether Its Drivers are Employees or Independent Contractors.

Regulation 560-12-2-.84 clearly imposes the duty upon Adam Cab as a lessor and as a headquarters operator to collect

and remit sales tax to the State. Adam Cab cannot be relieved of this responsibility because it failed to collect the taxes from its lessees. See Davis v. Chilivis, 142 Ga. App. 679, 237 S.E.2d 2 (1977) (dealer is liable for sales tax whether he collects the tax or not). Neither can Adam Cab be relieved of its responsibility because, as it argues throughout its brief, the taxicab drivers may be deemed to be independent contractors. The regulation clearly does not relieve a lessor or headquarters operator of its collection and remittance responsibility where its drivers may be considered independent contractors. Regulation 560-12-2.84(7)(b). The concept of independent contractor versus employee

is simply not relevant under the regulation. Furthermore, the United States Supreme Court has indicated that the label of "independent contractor" is not controlling in determining the constitutionality of a state's power to collect taxes from certain entities. Scripto v. Carson, 362 U.S. 207 (1960) (the fact that salesmen working in tax state are designated as "independent contractors" by foreign corporation is not controlling in determining if tax on corporation is constitutional).

Moreover, none of the cases cited in Adam Cab's brief directly or indirectly support its proposition that the State cannot require cab companies to collect sales tax from independent contractor

drivers. Indeed, all of the cases cited by Adam Cab are from other jurisdictions and involve interpretations of state statutes completely different from the regulation at issue. See, e.g., Noriega v. Schnurmacher Holding, Inc., 528 So.2d 28 (Fla. App. 1988) (court interpreted Florida statute expressly making tenant responsible for sales tax on a lease); Fridland Securities Co. v. Minnesota Commissioner of Revenue, 430 N.W.2d 154 (Minn. 1988) (issue before court was whether broker's precious metal transactions were "sales"); Corbin v. Commissioner of Revenue, 307 Minn. 237, 240 N.W.2d 809 (Minn. 1976) (court interpreted Minnesota sales tax statute

which did not specify which entities were responsible for collecting sales tax).

For example, in Employment Security Commission of Wyoming v. Laramie Cabs, Inc., 700 P.2d 399 (Wyo. 1985), the sole issue before Wyoming Supreme Court was whether an "employment" situation existed between taxicab drivers and a taxi company for purposes of Wyoming's employment security laws. Although the holding in Laramie Cabs has no bearing on this case, the Wyoming court did note that general rules concerning the master/servant relationship and the independent contractor concept are not determinative of a worker's status under the employment security law. 700 P.2d at 399. Similarly, these concepts are not

determinative of Adam Cab's liability under the Department's regulation at issue in this case. Moreover, the court in Laramie Cabs noted that taxicab drivers who lease cabs from cab companies are not engaged in independent trades, occupations, professions or businesses. 700 P.2d at 408.

The only constitutional case cited by Adam Cab also fails to support Adam Cab's challenge of Revenue Regulation 560-12-2.84. In State v. The Advertiser Co., 337 So.2d 942 (Ala. App. 1976), the issue before the court was whether a publisher of a newspaper, as opposed to its independent carriers, was liable for a municipal business license tax on retail sales, which tax paralleled the state

sales tax. In analyzing the case before it, the Alabama court noted that with respect to the state sales tax, the State of Alabama and the publisher had entered into an agreement whereby the publisher would directly return sales tax on sales made to its carriers to the state rather than require the state to tax the independent carriers. According to the court, this course of dealing -- like the regulation at issue -- was developed to avoid the inconvenience for the state of collecting the tax directly from the carriers. The court noted no infirmities -- constitutional or otherwise -- with this arrangement. 337 So.2d at 944.

CONCLUSION

Adam Cab has failed to articulate any valid reason why Regulation 560-12-2.84 should not be applied to it and why it should not be responsible for remitting sales tax on fares for transportation generated by its lessees. The regulation is constitutional as is its application to Adam Cab in this case. The Department respectfully requests, therefore, that this Court enter partial summary judgment in its favor as to the constitutionality

of Regulation 560-12-2-.84 and its application to Adam Cab in this case.

Respectfully submitted,

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IN THE SUPERIOR COURT OF CHATHAM COUNTY

ADAM CAB, INC. d/b/a ADAM CAB COMPANY, Appellant	*	
VS.	*	CIVIL ACTION X89-02026-4
MARCUS E. COLLINS, SR., STATE REVENUE COMMISSIONER, Appellee	*	

APPELLANT'S SUPPLEMENTAL BRIEF AND REPLY BRIEF TO APPELLEE'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Appellant avers that the regulations are unconstitutional because they hold a party liable for the improper conduct of another. They, therefore, are in violation of the due process clauses of the United States and Georgia Constitutions.

The Georgia Supreme Court has stated that legislation that has the same effect

is unconstitutional. Frankel v. Cone, 214 Ga. 733. The statute in question in the cited case made the owner of a motor vehicle liable if the vehicle was used for the prosecution of the business of or for the benefit of such owner even though operated without the owner's knowledge or consent express or implied. Former Ga. Code Ann., §68-301. The court stated, "In our opinion, the act clearly violates the due process clause of both the Federal and State Constitutions for the reason that it makes the owner of a motor vehicle liable if the vehicle is being used in the prosecution of or for the benefit of such owner, even though operated without notice to her or without her knowledge or without her consent express or implied. To hold

this statute constitutional, would be to hold a party liable for the negligent conduct of another, even though a trespasser was operating the vehicle against the express orders of the owner, and irrepective of how careful or free from negligence the owner was, the only condition being that it be operated for the benefit of the owner." Frankel v. Cone, id. at Page 736.

In the instant case the facts show that the taxicab company owner has no direct relationship with the operator except as lessor. The owner has no control over the operation of the individual taxicab or its driver. Nevertheless, the State through its regulations is attempting to hold the

taxicab owners responsible for the driver's collecting of sales tax which is beyond their control. For these reasons it is submitted that the regulations are unconstitutional and the Appellant's Motion for Summary Judgment should be granted.

CLARK AND CLARK

By /s/ Fred S. Clark
ATTORNEYS FOR APPELLANT

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IN THE SUPERIOR COURT OF CHATHAM COUNTY

STATE OF GEORGIA

ADAM CAB, INC. d/b/a ADAM CAB COMPANY, Appellant	*	
VS.	*	CIVIL ACTION X89-02026-B
MARCUS E. COLLINS, SR., STATE REVENUE COMMISSIONER, Appellee	*	

APPELLEE'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Pursuant to Section 56 of the Official Code of Georgia Annotated, O.C.G.A. §9-11-56, Marcus E. Collins, Sr., as State Revenue Commissioner, Appellee in this action, hereby moves the Court to enter partial summary judgment as to the constitutionality of Department of Revenue Regulation 560-12-2.84(7)(b) and its application to the Appellant on the

grounds that there is no genuine issue as to any material fact and the Appellee is entitled to judgment as a matter of law.

This motion is based upon all pleadings and filings in this action and the accompanying "Statement of Material Facts as to Which There is no Genuine Issue to be Tried," "Affidavit of Alver B. Claxton" and "Brief in Support of Appellee's Motion for Partial Summary Judgment and in Opposition to Appellant's Motion for Summary Judgment."

This 24th day of May, 1990.

Respectfully submitted,

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DANIEL M. FORMBY 269350
Senior Assistant
Attorney General

AMELIA WALLER BAKER 734375
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STATE OF GEORGIA

CHATHAM COUNTY

PERSONALLY APPEARED before the undersigned officer duly authorized to administer oaths, MARTIN J. KONCUL, who on oath taken deposes that he is President and principal stockholder of ADAM CAB COMPANY, INC. d/b/a ADAM CAB COMPANY and as such is familiar with the facts and circumstances involving the corporation, the operation of the business and the claim for sales tax made by the State of Georgia.

In response to the Statement of Facts the deponent states that either Adam Cab Company, Inc. d/b/a Adam Cab Company owns the taxicabs or there are some owner-operators. There are no cabs that are

jointly owned by Adam Cab Company, Inc. d/b/a Adam Cab Company and the drivers of the cabs.

Deponent states further that Adam Cab Company, Inc. d/b/a Adam Cab Company collected sales taxes on fares when they were turned in and remitted them and maintained records. These records were provided to the agent. This collection, remission and maintenance of records was done to the best ability of Adam Cab Company, Inc. d/b/a Adam Cab Company.

The records were provided to the agent, Mr. Claxton, who saw them and threw them into a box which is in the office of Adam Cab Company, Inc.

Deponent states further that in his opinion as an operator of a taxi-cab

company if he had terminated a relationship with the drivers for their failure to pay or collect the taxes he would have ultimately lost all of his drivers and been out of business.

This affidavit is given in response to Appellee's Motion for Partial Summary Judgment in the case entitled "Adam Cab., Inc. d/b/a Adam Cab Company v. Marcus E. Collins, Sr., State Revenue Commissioner," Civil Action No. X89-02026-B, Superior Court, Chatham County, Georgia.

This ____ day of June, 1990.

_____
MARTIN J. KONCUL

Sworn to and subscribed
before me this _____ day
of June, 1990.

_____
NOTARY PUBLIC, CHATHAM
COUNTY, GEORGIA